RECORD AND BRIEFS

No. 16-499

SUPREME COURT, U.S. FILED
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IN THE

# Supreme Court of the United States

JOSEPH JESNER et al.,

*Petitioners,*

v.

ARAB BANK, PLC,

*Respondent.*

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

## REPLY BRIEF FOR PETITIONERS

Michael E. Elsner
John M. Eubanks
Jodi Westbrook Flowers
MOTLEY RICE LLC
28 Bridgeside Boulevard
Mt. Pleasant, SC 29464

Mark Werbner
SAYLES WERBNER P.C.
4400 Renaissance Tower
1201 Elm Street
Dallas, TX 75270

Jeffrey L. Fisher
*Counsel of Record*
David T. Goldberg
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081
jlfisher@stanford.edu

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## REPLY BRIEF FOR PETITIONERS

Faced with an undeniably ripe circuit split on an issue this Court previously deemed worthy of certiorari, Arab Bank summons a blizzard of alternative theories for how it might ultimately prevail even if the ATS allows corporate liability. But none of these alternative arguments can obscure petitioners' fundamental point: This Court needs to settle the threshold question whether the ATS, in fact, permits corporate liability for violations of the law of nations. If so, cases like this should be allowed to proceed through the orderly process of litigation—including the consideration, as appropriate, of arguments such as those the Bank raises here. Further litigation in *this* case, in fact, is especially warranted: Arab Bank has already been found liable under the Antiterrorism Act (ATA), 18 U.S.C. § 2331 *et seq.*, for much the same wrongdoing at issue here. *See* Pet. 9-10. Petitioners' ATS claims are weighty, serious, and deserve assessment on the merits.

### I. This Court Should Resolve Whether the ATS Permits Corporate Liability.

Arab Bank argues the conflict over whether the ATS permits corporate liability should be allowed to persist. None of its contentions is persuasive.

1. Arab Bank initially asserts this case is no different from others where this Court recently denied certiorari. BIO 15-17. A quick review of those other cases, however, reveals this petition is the first one since *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), to warrant this Court's intervention.

Certiorari was denied in two of the three cases Arab Bank references—*Nestle USA, Inc. v. Doe*, No. 15-349, and *Cardona v. Chiquita Brands*, Nos. 14-777 & 14-1011—before the circuit split over corporate liability resolidified. It made sense when those cases were denied to wait and see whether the Second Circuit would take up the panel's suggestion in this case to convene an "en banc sitting" to hold that the ATS permits corporate liability. Pet. App. 26a. This Court denied review in the third case, *Ntsebeza v. Ford Motor Co.*, No. 15-1020, shortly after the Second Circuit denied en banc review here. But that case did not cleanly present the issue of corporate liability. The court of appeals had dismissed the case on two other grounds, without meaningfully addressing the corporate liability issue. *See Balintulo v. Ford Motor Co.*, 796 F.3d 160 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 2485 (2016).[1]

2. Citing comments from the judges on its side of the en banc battle below, Arab Bank next contends that the question whether the ATS permits corporate liability is of "minimal" practical importance. BIO 19-20. Arab Bank is mistaken. Petitioner has already shown that the issue continues to arise in post-*Kiobel* ATS litigation, and it may well be dispositive here—as it will be in many other cases where plaintiffs can satisfy *Kiobel*'s

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[1] Another petition for a writ of certiorari raising the question presented is now pending in *Licci v. Lebanese Canadian Bank*, No. 16-778. This Court may wish to delay considering the Petition in this case until *Licci* is ready for consideration. The best course of action is ultimately to grant certiorari here and hold *Licci* pending the outcome here.

"touch and concern" test. Pet. 19-20. Whatever the full span of such cases may be, the national interests here—deterring corporations from using their presence in our country to facilitate terrorist activities and in compensating victims of such attacks—are more than enough to establish the ongoing importance of the question presented.

Lest there be any doubt, Arab Bank's own litigation conduct belies its contention here. The first 15 pages of the argument section of its Second Circuit brief urged that court to reaffirm its prior view that "ATS jurisdiction does not extend to claims against corporations," CA2 Br. 14; *see id.* 14-29. Parties do not usually lead off their briefs with extended arguments on issues of "minimal . . . importance," BIO 18. And when a party has prevailed on the issue it spotlighted below, it should not be heard in this Court to say that various contentions it subordinated below now render its lead argument insignificant.

3. Nor does Arab Bank's defense of the Second Circuit's categorical bar against ATS corporate liability provide reason for denying review. In light of the entrenched conflict over that important question, this Court should intervene regardless of how it should be resolved on the merits.

At any rate, Arab Bank's arguments fall flat. Relying on footnote 20 of *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the Bank first asserts that the ATS strips domestic law of its ordinary primacy in determining whether corporations may be held liable for committing torts. BIO 29. But the Petition has already explained that the *Sosa* footnote

dictates no such thing, Pet. 28, and the Bank provides no response.

Arab Bank next seeks cover under two exceptions to the general rule that corporations may be held liable in tort. BIO 29-30. Neither exception applies here. The first exception, involving *Bivens* actions, is grounded in the presumption against an "implied right of action." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66-74 (2001). But that cannot help the Bank because the cause of action here is not implied. The second exception, which involves the Torture Victim Protection Act, rests on the text of that statute, which limits liability to "individuals." *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1705-08 (2012). The ATS, however, contains no textual departure from default liability rules. As the United States has explained, that difference is decisive. Br. for United States at 27 n.16, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491).

Even if petitioners were required to show as a matter of international law that civil corporate liability for violations of the law of nations is an accepted norm, Arab Bank's position on the merits would still be incorrect. The Bank contends the U.N. Council on Human Rights has suggested there is no "universal norm recognizing corporate liability." BIO 28. But the Bank's assertion relies on selective quotations from a decade-old publication. In the Council's current position paper on the subject, it makes clear, as "universally applicable" rules, that "business enterprises" can violate the law of nations and that States must provide a remedy for such breaches. *See* Human Rights Council, *Guiding Principles on Business and Human Rights*, U.N.

Doc. A/HRC/17/31, at 5-6 (Mar. 21, 2011); *see also* Amicus Br. of Int'l Law Scholars 4-16.

Arab Bank also maintains that historical precedent, including the Nuremberg Trials, cuts against imposing corporate liability for violations of the law of nations. But the Amicus Brief of Professors of Legal History (at 4-24) demonstrates otherwise. So do the numerous briefs filed in *Kiobel* by experts addressing that history. *See* Amicus Br. of Nuremburg Scholars, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491); Amicus Br. of Nuremberg Historians & Int'l Lawyers, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491).

## II. None of Arab Bank's Alternative Arguments for Affirmance Justifies Foregoing Review Here.

This Court has stressed time and again that it is "a court of review, not of first view." *Skinner v. Switzer*, 562 U.S. 521, 537 (2011) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)). This Court need not concern itself, therefore, with arguments that a claim "should fail for lack of merit" when the court of appeals has not addressed those arguments. *Id.* It can simply leave the arguments for "remand." *Id.* This is especially so when a respondent presses arguments that were not "adequately raised in the lower courts," *Chaidez v. United States*, 133 S. Ct. 1103, 1113 n.16 (2013), or "would require a deeply factbound analysis," *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1949 (2015).

Arab Bank nevertheless presses *six* alternative arguments in defense of the Second Circuit's decision—none of which was addressed by the Second Circuit, and many of which suffer from other procedural flaws as well. This Court should ignore

this litany. The decision below rests exclusively on the corporate liability question presented, and that question is more than enough to command this Court's full attention. But if this Court were to peek behind the curtain to assess what might happen after reversing and remanding on the corporate liability issue, it would see that petitioners have a very real chance of success.

1. Arab Bank's suggestion (BIO 21) that this case could be "straightforwardly" dismissed "on extraterritoriality grounds" is misleading at best. Neither the district court nor the Second Circuit has addressed that issue here. But the Second Circuit has held—in two cases Arab Bank ignores—that allegations very similar to those here displace the presumption against extraterritoriality. *See Licci v. Lebanese Canadian Bank*, 834 F.3d 201, 217 (2d Cir. 2016) (holding that deliberately and repeatedly using correspondent bank account in New York to facilitate wire transfers for terrorist organization displaced the presumption); *see also Mastafa v. Chevron Corp.*, 770 F.3d 170, 190-91 (2d Cir. 2014) (same regarding using escrow account in New York to launder money to aid torture, as well as extrajudicial imprisonment and killings).

As in those cases (and unlike in *Kiobel*), Arab Bank's wrongdoing occurred partly on U.S. soil. In particular, evidence at the ATA trial demonstrated that Arab Bank used its New York branch to process and convert over $120 million of foreign currency, such as the Saudi Riyal and Jordanian Dinar, into U.S. dollars. Pet. 6-8. Arab Bank knew these transactions were destined for terrorist leadership, families of suicide bombers, and terrorist front

organizations because, in most cases, these individuals were Arab Bank accountholders. *Id.*; *see also Linde v. Arab Bank, PLC*, 97 F. Supp. 3d 287, 328-30 (E.D.N.Y. 2015).

Arab Bank tries to downplay its U.S.-based actions as "automated" and ministerial. BIO 22-23. They were neither. Petitioners allege—and the plaintiffs in the parallel Antiterrorism Act (ATA) litigation have proven at trial—that the Bank "*knowingly* provided financial services to Hamas" through its New York branch and "*knew* Hamas was a foreign terrorist organization." *Linde*, 97 F. Supp. 3d at 299, 332 (emphasis added); *see also Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 290 (E.D.N.Y. 2007). Using the New York branch was an essential component of this scheme because it was the only way Arab Bank could deal in U.S. dollars, "the preferred currency" among terrorists in the Middle East for transferring money across international borders. Pet. 6-7. Such abuse of this Nation's banking system and our currency is "an issue of great importance" to the country. *Al Rushaid v. Pictet & Cie*, ___ N.E.3d ___, 2016 WL 6837930, at [19] (N.Y. Nov. 22, 2016).

Arab Bank, no doubt, will protest that *Licci* and *Mastafa* are distinguishable, or more generally that its actions here do not "touch and concern" U.S. interests "with sufficient force to displace the presumption against extraterritoriality," *Kiobel*, 133 S. Ct. at 1669. That is its prerogative, on remand. But for now, Arab Bank's argument provides no reason for denying review of the Second Circuit's corporate liability holding.

2. Nor do Arab Bank's arguments—not yet considered by any court—concerning international relations (BIO 23-26) justify denying review. Page limitations preclude an extended response here (as they will at the merits stage if Arab Bank persists in its scattershot approach). But suffice it to say that deciding the purely legal question whether the ATS allows corporate liability and then remanding for further proceedings (including, if warranted, consideration of Arab Bank's foreign relations argument) will not cause any international friction.

Furthermore, all the foreign relations arguments Arab Bank makes apply nearly identically to the parallel ATA suit against it "for some of the very same attacks at issue here," BIO 30. Yet in the ATA, Congress resolved the balance among the interests at stake in favor of "deter[ring] and punish[ing] the support of terrorism." *Linde v. Arab Bank, PLC*, 706 F.3d 92, 112 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 2869 (2014). The executive branch has never suggested otherwise. Indeed, the Bank itself extols the ATA as a valuable and appropriate tool for "combat[ing] terrorism." BIO 14, 30-31. If that is so, then the same must be true here.

3. Arab Bank argues that petitioners' ATS claims are illegitimate because petitioners could have sought remedies in Israel. BIO 26-27. The Bank has never previously made this argument. It therefore is "forfeited." *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 397 (2015).

At any rate, this Court has never held that plaintiffs must exhaust remedies in foreign forums before bringing ATS claims; it has said only that it might "consider [such a] requirement in an

appropriate case." *Sosa*, 542 U.S. at 732 n.21. This would hardly be "an appropriate case," much less one where an exhaustion argument would warrant denying certiorari on a totally different issue. The lower courts have never suggested Israel would have exercised jurisdiction here (something petitioners seriously doubt, in no small part because Arab Bank almost certainly would have opposed it). *See Almog*, 471 F. Supp. 2d at 295 (noting that Arab Bank wanted petitioners to "refile their claims in Jordan," not Israel). In addition, it made perfect sense for petitioners to bring their ATS claims in a U.S. court. The claims arise from the same operative facts as their co-plaintiffs' ATA claims (many ATS and ATA plaintiffs, in fact, were bombed sitting side-by-side). *See* Pet. 8-9. And the district court unquestionably had jurisdiction over the latter claims.

4. Arab Bank's argument that petitioners' aiding and abetting claims fail because the Bank lacked "the *purpose* of supporting recognized violations of the law of nations" (BIO 34) is likewise improper. In the Second Circuit, the Bank argued the ATS "does not provide for aiding and abetting liability," CA2 Br. 40-42, but it never contended it lacked the *intent* necessary to aid and abet. It cannot now defeat certiorari by advancing that new and very different argument. In any event, the district court has held that petitioners plausibly allege the Bank "knowingly and intentionally" provided support to terrorist organizations. *Almog*, 471 F. Supp. 2d at 291. "[K]nowing and intentional conduct is synonymous with purposeful conduct." *Lev v. Arab Bank, PLC*, 2010 WL 626336, at *3 (E.D.N.Y. Jan. 29, 2010).

5. Arab Bank next argues petitioners' claims will fail because "no universal norm against 'terrorism' exist[s] under customary international law." BIO 32 (quotation marks and citation omitted). This argument is irrelevant at this stage. Petitioners allege the Bank violated the law of nations not only by financing terrorism, but also by aiding and abetting genocide and crimes against humanity. The district court held these latter claims satisfy *Sosa*'s requirement that ATS plaintiffs rely on international norms that are "specific, universal, and obligatory," 542 U.S. at 732. *Almog*, 471 F. Supp. 2d at 274-76, 285-94. Petitioners' genocide and crimes-against-humanity claims thus independently raise the corporate liability question presented, and—as explained in the section immediately above—Arab Bank does not properly present any challenge to the district court's determination that those claims are viable under the ATS.

In any event, the district court correctly held that petitioners' conduct-based claim of terrorism financing meets *Sosa*'s universal-norm requirement too. "[T]he specific conduct alleged—organized, systematic suicide bombings and other murderous attacks on innocent civilians intended to intimidate or coerce a civilian population—are universally condemned." *See Almog*, 471 F. Supp. 2d at 281. Arab Bank argues it is impossible to distinguish, in the context of financing such operations, between "terrorists" and "freedom fighters," BIO 33. But international treaties banning the financing of terrorism teach otherwise, and even "freedom fighters" are bound by "[t]he three century old 'principle of distinction,' which requires parties to a

conflict to at all times distinguish between civilians and combatants." *Almog*, 471 F. Supp. 2d at 278; *see also id.* at 276-85 (canvassing authorities).

6. Arab Bank finally contends that petitioners' claims will necessarily fail because petitioners will be unable prove "that the Bank's actions led directly to the plaintiffs' injuries." BIO 35-36 (internal quotation marks and citation omitted). Once again, no court has yet considered this argument. And the argument is not only premature; it rests on a faulty premise. Petitioners need not show, as Arab Bank would have it (BIO 36), "but for" causation. A wrongdoer's conduct can be enough to establish factual causation even when that conduct is "alone 'insufficient . . . to cause the plaintiff's harm,'" if "'when combined with conduct by other persons,'" the conduct is "'more than sufficient to cause the harm.'" *Paroline v. United States*, 134 S. Ct. 1710, 1723 (2014) (quoting Restatement (Third) of Torts § 27, cmt. f, at 380-81 (2000)).

Such is the case with terrorism financing. *See Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 695-98 (7th Cir. 2008) (en banc). Given "the fungibility of money," a plaintiff in a case such as this need only show that the defendant's misconduct "significantly enhanced the risk of terrorist acts and thus the probability that the plaintiff's decedent would be a victim." *Id.* at 698. Petitioners have alleged, and stand ready to prove, such collaborative action. *See* Pet. 4-6.

Arab Bank responds (BIO 35) by citing cases finding no causation where plaintiffs claimed financial institutions did nothing more than "provid[e] routine banking services" to organizations

and individuals that had ties to terrorism. *In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 118, 124 (2d Cir. 2013). But as we have explained, and the district court found, "there is nothing 'routine' about the services the Bank is alleged here to have provided." *Almog*, 471 F. Supp. 2d at 291. Arab Bank was not "a mere unknowing conduit for the unlawful acts of others, about whose aims the Bank [was] ignorant." *Id.* Instead, it transferred money through its New York branch with the expectation and purpose of providing material support to the terrorist activity that harmed petitioners. Pet. 4-8.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Michael E. Elsner
John M. Eubanks
Jodi Westbrook Flowers
MOTLEY RICE LLC
28 Bridgeside Boulevard
Mt. Pleasant, SC 29464

Mark Werbner
SAYLES WERBNER P.C.
4400 Renaissance Tower
1201 Elm Street
Dallas, TX 75270

Jeffrey L. Fisher
*Counsel of Record*
David T. Goldberg
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081
jlfisher@stanford.edu

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